IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

R.S.A. No.2980 of 1984(O&M)
Date of Decision: February 4, 2011

Daya Chand son of Rattan Singh son of Kallu Village Jawan, Tehsil Ballabgarh, District Faridabad.

.....Appellant

v.

1.Shamlat Patties Med Singh, Inder Singh of Village Jawan, Tehsil Ballabgarh, District Faridabad, through Rang Lal son of Kharak Singh and others.

.....Respondents.

CORAM: HON'BLE MR.JUSTICE RAM CHAND GUPTA

Present: Mr.Hemant Sarin, Advocate
for the appellant.

Mr.Gur Rattan Pal Singh, Advocate
for the respondents.

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RAM CHAND GUPTA, J.

1. Facts leading to the present Regular Second Appeal are as under:

2. Respondent no.1-through respondent nos.2 to 6 filed a civil suit in representative capacity under Order I Rule 8 of the Code of Civil Procedure (hereinafter to be referred as the `Code') on behalf of co-owners of shamlat patties Med Singh and Inder Singh of village Jawan against present appellant-defendant no.1 and respondent nos.8 to 22 for possession of land in dispute measuring 24 kanals 12 marlas, described in para 1 of the plaint.

3. It has been averred that shamlat patties Med Singh and Inder Singh are owners of the land in dispute and there are numerous owners in the said patties, who are having same interest. Hence, the present suit has been filed in representative capacity under Order I Rule 8 of the Code.

4. Defendant nos.2 and 3, namely, Thakur Lal and Piara Lal had sold the suit land owned by said patties to present appellant-defendant no.1-

Daya Chand, vide registered sale deed dated 5.9.1972, registered on 11.9.1972 for alleged sale consideration of Rs.10,000/- on the basis of a decree dated 30.8.1972 obtained by them in Civil Suit No.542/1972 titled as Thakur Lal and others vs. Lal Singh and others. Defendant nos.2 and 3 had no right to alienate the land in dispute on behalf of the patties and hence the said sale is illegal, void and ineffective and not binding on the rights of plaintiffs-patties. Decree dated 30.8.1972 is also void, illegal and ineffective.

5. The said decree and the sale deed have been challenged on the ground that no service was effected on all the owners/co-sharers of the aforesaid patties, as required by law and that no public advertisement of the said previous suit was made through publication and that the said previous suit was collusive between Thakur Lal etc. and Lal Singh etc.; that sale consideration allegedly received by defendant nos.2 and 3 was not paid to the co-sharers of the patties; that no power of attorney can be given to individual person through a suit and hence, defendant nos.2 and 3 were not competent to sell the suit land on behalf of all the co-sharers of the patties; and that defendant nos.2 and 3 were not competent to alienate more than their share in the suit land.

6. It is further averred that plaintiffs came to know of the impugned sale and decree in June 1976 for the first time. On refusal of defendants to admit claim of plaintiffs-patties and to deliver possession of the suit land to them and to treat impugned sale and decree null and void, the present suit for possession was filed on behalf of all the co-sharers of the plaintiffs-patties.

7. Defendants contested the suit filed by the plaintiffs, inter alia, on the ground that the impugned judgment and the sale-deed are perfectly legal and valid and hence, plaintiffs-patties are not owners of the suit land and that defendant no.1 (present appellant) has become owner in possession of the same by virtue of the said decree and the sale-deed; that the plaintiffs have no locus standi to file the present suit; that the suit has not been filed as representative of all the co-sharers of the patties; that the proper service was effected on all the co-sharers in the previous suit under Order I Rule 8 of the Code and they were duly represented by Lal Singh, Girdhar and Gyasi in that suit; that it is not necessary to publish the advertisement in the

newspapers; that there was no collusion between the parties of the previous suit; that defendant nos.2 and 3 distributed the sale consideration of Rs.10,000/- amongst all the co-sharers of the patties; that defendant nos.2 and 3 were duly authorized to execute the impugned sale deed; that plaintiffs had knowledge and notice of the impugned sale and decree since the very beginning and hence, the suit is not within limitation; the suit is not maintainable in the present form; that the suit is barred by principle of res judicata and the suit has not been properly valued for the purpose of court fee and jurisdiction.

8. In the replication, respondent-plaintiffs controverted the pleas taken by defendants in the written statement and re-asserted the assertions made in the plaint. From the pleadings of the parties, the following issues were framed for adjudication by learned trial Court:

> "1. Whether the plaintiffs are owners of the suit land as alleged? OPP
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> 2. Whether the decree dated 30.8.1972 in civil suit No.542 of 1972 of the court of Sub Judge Ballabgarh Thakur Lal and others v/s. Lal Singh and others is illegal, in-effective, void and not binding on the plaintiffs as alleged? OPP
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> 3. Whether the sale deed dated 11.9.1972 in favour of defendant no.1 is illegal, void and not binding on the plaintiffs, as alleged? OPP
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> 4. Whether the suit is barred by time? OPD
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> 5. Whether the suit is not maintainable in the present form? OPD
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> 6. Whether the plaintiffs are estopped by their act and conduct from filing the present suit? OPD
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> 7. Whether the suit is barred by the principle of res judicata as alleged? OPD
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> 8. Whether the suit has not been properly valued for purposes of jurisdiction and court fee? OPD
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> 9. Whether the plaint and vakalatnama have not been signed by plaintiff no.4, if so, to what effect? OPD
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> 10. Whether the plaintiffs 2 to 5 are not the representative of the parties in dispute as alleged in preliminary objection No.7

of the w/s. If so, its effect? OPD

11. Relief."

9. Parties adduced their evidence in support of their respective contentions before learned trial Court. Learned trial Court after hearing both the parties and after going through the whole record, discussed issue nos.1 to 3 together and decided the same in favour of respondent-plaintiffs by holding that the plaintiffs continued to be the owners of the suit land and that some of the defendants being co-sharers in the plaintiffs-patties are also co-sharers in the suit land and that defendant no.1 (present appellant) has not become exclusive owner of the suit land. Impugned decree dated 30.8.1972 was held to be illegal, ineffective, void and not binding on the rights of the plaintiffs. Impugned sale deed dated 5.9.1972, registered on 11.9.1972 executed vide Ex.DW5/a was also held illegal, void, and not binding on the rights of the plaintiffs except to the extent of shares of respondent-defendant nos.2 and 3, who executed sale deed in favour of defendant no.1 (present appellant).

10. While discussing issue no.4, it has been observed by learned trial Court that the present suit has been filed for possession on the basis of title and hence limitation for filing the suit is 12 years under Article 65 of Schedule attached to the Limitation Act. It was also observed that even under Article 58 of the Schedule, the period of limitation starts when the right to sue first accrues and that in the present case, it has been alleged and proved that plaintiffs came to know of the impugned decree and sale in June 1976 and hence the period of limitation starts running from June 1976 and hence, the said issue was also decided in favour of the respondent-plaintiffs and against defendants.

11. While discussing issue no.5, it was observed that as the impugned decree and sale deed are void, and hence, plaintiffs were not required to seek declaration for getting the same set aside and that respondent-plaintiffs could treat them as non-existent and hence, it was held that suit for possession as filed by respondent-plaintiffs is maintainable and the said issue was also decided in favour of respondent-plaintiffs and against defendants.

12. While discussing issue no.6, it has been observed that Girdhar is estopped from filing present suit because he is party to the previous suit

by name and however, other plaintiffs being co-sharers in the patties are having right to file the present suit in the representative capacity as they were not served in the previous suit and hence, this issue was also decided in favour of respondent-plaintiffs and against defendants.

13. While discussing issue no.7, it was held that decree is not binding on the present plaintiffs as they were not validly sued in representative capacity in previously instituted suit and hence suit is not barred by res judicata. This issue was also decided in favour of respondent-plaintiffs and against defendants. However, it was held that Lal Singh, Girdhar and Giasi are bound by the previous decree as they were parties to the previous decree.

14. While discussing issue no.8, it was observed by learned trial Court that respondent-plaintiffs have not sought relief of declaration for declaring the impugned decree and sale deed as a nullity and more over, ad valorem court fee on the market price of the suit land was paid and hence, this issue was also decided in favour of respondent-plaintiffs and against defendants.

15. Issue No.9 was also decided in favour of respondent-plaintiffs and against defendants.

16. While discussing issue no.10, it was observed that due proclamation under Order I Rule 8 of the Code was made in the present case and hence, the suit was properly filed in the representative capacity. The said issue was also decided in favour of respondent-plaintiffs and against defendants.

17. As a sequel to findings on various issues, learned trial Court decreed the suit filed by respondent-plaintiffs for joint possession of the suit land described in para 1 of the plaint, leaving the parties to bear their own cost.

18. Aggrieved against the said judgment and decree, appeal was filed by present appellant-defendant no.1-Daya Chand and other defendants before learned Additional District Judge- II, Faridabad, who dismissed the appeal with the modification to the extent that the suit of respondent-plaintiffs was decreed regarding the suit land except shares of Lal Singh, Girdhar and Giasi, who were parties to the previous suit.

19. Aggrieved against the said judgment and decree passed by

learned First Appellate Court, the present regular second appeal has been filed by Daya Chand, appellant-defendant no.1.

20. I have heard learned counsel for the parties and have gone through the whole record carefully.

21. It has been contended by learned counsel for the appellant that the present suit for mere possession is not maintainable without there being a prayer for setting aside decree dated 30.8.1972 and registered sale deed dated 11.9.1972 in favour of the appellant. It is also contended that the suit also could not be decreed qua share of present respondent nos.8 and 9, i.e., defendant nos.2 and 3, who had executed the sale-deed in favour of present appellant. It is also contended that in view of statements of one of the plaintiffs and by Hira Lal that he did not want to proceed with the suit, illegality has been committed by learned both the Courts below by decreeing the suit. Hence, it is argued that judgment and decree passed by both the Courts below are illegal and perverse. He has also prayed for framing of the following substantial questions of law on the plea that the same arise for consideration in this second appeal:-

> "1. Whether the courts below could decree the suit of the plaintiff-respondents without there being a prayer therein for setting aside the decree dated 30.8.1972 and the registered sale deed of 11.9.1972 in favour of the appellant?
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> 2. Whether in view of the statement made on 28.10.1981 by Hira Lal, one of the plaintiffs, that he did not want to proceed with the suit, the Court below could have still decreed the same?
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> 3. Whether the suit could be decreed qua the share of respondent nos.8 and 9 who had executed the sale deed in favour of the appellant?
>
> 4. Whether the judgments and decrees of the Courts below are perverse?

22. On the other hand, it has been argued by learned counsel for the respondent-plaintiffs that earlier decree and the sale-deed were null and void and the same was result of collusion between the parties to the decree and the sale-deed just to deprive all the co-sharers of the plaintiffs-patties from the enjoyment of the land in dispute, as co-owners in possession.

Hence, it is contended that no substantial question of law arises in this regular second appeal for consideration by this Court.

23. At the time of admission of this appeal by Coordinate Bench of this Court on 18.4.1985, no substantial question of law was framed. However, now an application under Section 151 of the Code was filed on behalf of appellant-defendant no.1 for framing of substantial questions of law, as aforementioned.

24. Law has been settled by Full Bench of this Court in **Dayal Sarup v. Om Parkash (since deceased) through L.Rs and others** (2010-4)160 PLR 1, that this Court can formulate question of law as contemplated under Section 100 of the Code at any point of time before hearing of the appeal, even without amending the grounds of appeal. It has also been held that it is the duty of the court to formulate substantial question of law while hearing the appeal under Section 100(4) and 100(5) of the Code and question of law can be permitted to be raised at any stage of proceedings.

25. Hence, in view of the legal proposition settled in the aforementioned judgment of Full Bench of this Court, it is duty of this Court to frame substantial question of law and the same can be framed at any time before hearing of the appeal.

26. Taking into consideration the aforementioned facts and circumstances of the case, I am of the view that the following substantial questions of law arise for adjudication in this appeal.

> "1. Whether the Courts below could decree the suit of respondent-plaintiffs without there being a prayer therein for setting aside the decree dated 30.8.1972 and sale deed dated 11.9.1972 in favour of the appellant.
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> 2. Whether the suit could be decreed qua the share of respondent nos.8 and 9, i.e., defendant nos.2 and 3, who had executed the sale deed in favour of the appellant."

27. So far as filing of previous suit by present respondent nos.8 and 9, i.e., defendant nos.2 and 3 against Lal Singh, Girdhar and Giasi, as representatives of plaintiffs-patties under Order I Rule 8 of the Code is concerned, defendant nos.2 and 3 in order to succeed in the said suit in representatives capacity on behalf of all the co-sharers of the patties were required to seek permission of the Court and the notice was to be given to

all the parties whom it is proposed to represent in the suit and if the said essential condition was not fulfilled, the suit could not be stated to be in a representative capacity on behalf of all the co-sharers of the patties. For this view reliance is placed upon a Division Bench judgment of this Court rendered in **Jai Narain and others v. Chandgi Ram and others**1977 PLJ 527, relevant paragraphs of which read as under:-

> "3. The scope of Order 1, Rule 8 of the Code is, that with the permission of the Court, a number of persons having same interest in the suit, can sue or be sued by one or more of them, on behalf of themselves. The conditions for the applicability of this rule are:-
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> (i) the parties must be numerous;
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> (ii) they must have the same interest in the suit;
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> (iii) the Court's permission under the rule must be obtained; and
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> (iv) notice must be given to the parties whom it is proposed to represent in the suit.
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> 4. The obtaining of judicial permission is an essential condition for binding persons other than those actually parties to the suit and their privies. If this essential condition is not fulfilled, the suit cannot be said to be a representative one. The proper course is to obtain permission before the suit is instituted."

28. In the present case, summons issued in the previously instituted suit, copy of which is Ex.DW2/1, shows that such summons were not issued to the persons mentioned in the list attached with the application under Order I Rule 8 of the Code. Summons either in person or by way of substituted service, i.e., munadi or publication were to be served on all the co-sharers as mentioned in the list attached with the application filed under Order I Rule 8 of the Code and the summons were to be ordered to be served personally on the alleged representatives, i.e., Lal Singh, Girdhar and Giasi, who were made parties in their individual capacity as well. However, it has been observed by learned trial Court that summons were issued in this case to Lal Singh, Girdhar and Giasi only by way of munadi and summons were not issued for their personal service and no summon at all was issued

to co-sharers of the patties, as per the list attached with the plaint. Hence, the order of learned trial Court of that suit for service of all the co-sharers of the patties by way of munadi was not complied with. The said three persons on whom service was effected were served as co-sharers of the aforesaid patties and not representatives of all the co-sharers of the patties.

29. Perusal of Ex.DW2/1 shows that munadi was made for service of Lal Singh, Girdhar and Giasi only and not for service of all the co-sharers of the Patties. It has also been rightly observed by learned trial Court that no permission was obtained of the Court for filing the suit in a representative capacity and hence it was rightly held that the impugned decree passed in previously instituted suit is null and void and not binding on all the co-sharers of the patties, who were not parties to the said decree.

30. It has also been rightly observed by learned trial Court that even in the plaint of previously instituted suit, it was averred by defendant nos.2 and 3 that though all the co-sharers of the aforesaid patties have authorised them to sell the suit land on their behalf by executing necessary sale-deed on behalf of co-sharers and however, a few days later some of the co-sharers refused to adhere to the said decision and authority given to them to sell the land on behalf of all the co-sharers of the patties was impliedly revoked and hence on this ground as well it cannot be said that defendant nos.2 and 3 were authorised to execute the sale-deed on behalf of all the co-sharers of the patties. It has also been rightly observed that authority to alienate immovable property cannot be orally given to an individual and that the said authority had to be given through written document as per the provisions of Power of Attorney Act and hence the alleged oral authority given by all the co-sharers to defendant nos.2 and 3 to sell the land belonging to plaintiffs-patties on behalf of all the co-sharers of the patties, cannot be said to be a valid authority. Hence, on this ground as well defendant nos.2 and 3 were not competent to sell the land of the plaintiffs to defendant no.1, i.e., present appellant.

31. There is another aspect of this case as well. One of the vendors, i.e., defendant no.3 is none else than real uncle of defendant no.1-present appellant in whose favour sale was effected. It is a very suspicious circumstance and there is force in the argument of learned counsel for the respondent-plaintiffs that the previous suit as well as sale-deed was a result

of collusion between the parties to the previous suit and the sale-deed.

32. There is another aspect of this case as well. As per order I Rule 8(4) of the Code, no compromise/agreement can be recorded in representative suit under Order XXIII Rule 3 of the Code, unless notice thereof has been given to all the interested persons. The impugned decree in the previously instituted suit was based on the basis of admission of alleged representatives. The said admission amounted to agreement or compromise and hence, the same could not form basis of a valid decree because no notice of the same was given to interested persons, i.e., all the co-sharers of the plaintiff-patties, as required under Order I Rule 8(4) of the Code.

33. In the impugned sale-deed, there is recital that sale consideration of Rs.10,000/- was already paid. Hence, nothing was paid at the time of registration of the sale-deed. A plea was taken that receipt was executed by defendant nos.2 and 3 in favour of defendant no.1 in token of receipt of sale consideration. However, no such receipt was proved. No such evidence was also adduced that the alleged sale consideration was distributed amongst all the co-sharers of the patties. Contradictory stands were taken by witnesses of defendants on the point and hence, it was rightly held by learned Courts below that payment of sale consideration has not been proved and that on this ground as well, the impugned sale cannot be said to be a valid one.

34. It has been vehemently argued by learned counsel for the appellant that suit for mere possession is not maintainable without seeking decree for declaring impugned decree-sheet in previously instituted suit and the sale-deed as invalid and that without challenging the decree and the sale-deed, suit for mere possession cannot be decreed in favour of respondent-plaintiffs.

35. On this point, he has placed reliance upon **Nagappan v. Ammasai Gounder and others** (2004) 13 Supreme Court Cases 480 and **Vishwambhar and others v. Laxminarayan (Dead) through LRs and another** (2001) 6 Supreme Court Cases 163.

36. I have carefully gone through both the aforementioned authorities. However, both the aforementioned cases pertain to sale of property of a minor without obtaining permission of the Court under Section

8(2) of the Hindu Minority and Guardianship Act, 1956 (hereinafter to be referred to as the `Act'). Sale of property owned by a minor by his guardian without seeking permission under Section 8(2) is not void, and however, the same is voidable at the instance of the minor, who is having right to get the alienation set aside, if he wants to avoid the transfer and recover the property from the purchasers after attaining the majority. Hence, none of the said authorities are applicable to the facts of present case.

37. In the present case, as already discussed above, the impugned judgment and decree passed in previously instituted suit and subsequent sale-deed executed in favour of present appellant-defendant no.1 are null and void being result of collusion between the parties to the previously instituted suit and the parties to the sale-deed. Sale-deed in favour of appellant-defendant no.1 cannot be said to be validly executed on behalf of all the co-sharers of the patties, who are admittedly owners of the land in dispute and hence, when the sale-deed itself is void, having not been executed by all the co-owners, all the co-owners of the patties are not bound by the said decree and the sale-deed and hence, they are not required to seek declaration that the same are null and void. Rather, the same can be taken as null and void and suit for mere joint possession is maintainable on the basis of title.

38. Hence, substantial question of law No.1, as framed above, is decided in favour of respondent-plaintiffs and against present appellant-defendant no.1.

39. However, there is force in the argument of learned counsel for the appellant-defendant no.1 that learned Courts below should not have decreed the suit of respondent-plaintiffs qua share of present respondent nos.8 and 9 (defendant nos.2 and 3) who were parties to the previously instituted suit and who had executed the impugned sale deed in favour of present appellant-defendant no.1.

40. Learned trial Court has also observed that sale-deed executed by defendant nos.1 and 2 in favour of present appellant-defendant no.1 is binding upon them. Hence, the impugned judgment and decree qua land in dispute to the extent of share of defendant nos.2 and 3, i.e., present respondent nos.8 and 9 cannot be sustained in the eyes of law.

41. As a sequel to my above discussion, there is no merit in the

present appeal. The same is hereby dismissed with no order as to cost except that judgment and decree is modified to the extent that the suit of respondent-plaintiffs for joint possession is decreed regarding suit land except shares of Lal Singh, Girdhar, Giasi, Thakar lal and Piare Lal.

4.2.2011 **(Ram Chand Gupta)**
meenu **Judge**

Note: Whether to be referred to Reporter? Yes/No.

4.2.2011 (Ram Chand Gupta)
Judge